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CONTRACTS SYMPOSIUM ISSUE: FEATURED SPEAKER: THE RIGHT TO CONTRACT AS A CIVIL RIGHT

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LexisNexis Summary

... Rather, and as the Civil Rights Acts of both the nineteenth and twentieth centuries make clear, the civil rights of which we cannot be discriminatorily deprived by virtue of those laws notably include the right to: contract, own and sell property, make a will, testify in court, sue for injuries wrongfully inflicted upon us, and the right to be protected by the state against private or public acts of violence. ... THE NATURAL RIGHT TO CONTRACT AND ITS CONSTITUTIONAL ORIGINS I am going to call the familiar understanding of the right to contract where civil rights laws in particular and civil society in general are in such apparent tension, a "self-sovereignty" conception of that right. ... The civil right to contract then guarantees us access to those laws and institutions that structure our markets for consumer goods, protecting our participation in those markets. ... Again, the conflict between civil rights and contract rights stems from viewing civil rights as simply anti-discrimination rights, and contract rights as quasi-constitutional or natural rights of individual self sovereignty, delineating a sphere within which the individual has sole authority to determine whether, with whom, and on what terms to assume other-regarding obligations. ... We enter the workforce, schooling, commercial markets, and health care through contracts of employment, enrollment, sale and purchase, or insurance.

Text

[*551]

The "right to contract," whether originating in the Constitution, common law, or natural law, has been long and widely felt to be in tension with our civil rights, broadly conceived. ¹ The individual himself, we generally believe, and only the individual, should decide the scope and terms of his affirmative, voluntary, and other-regarding undertakings. When he does so through contract, the individual and only the individual should determine the terms under which he will perform those duties. The civil rights laws of the nineteenth, twentieth, and early twenty-first centuries, and the various rights they create interfere with these natural freedoms.

So, for example, our freedom to hire whomever we wish to hire, and then our freedom to fire them at will is compromised by our obligation under the Civil Rights Acts of 1964 ² to not discriminate against candidates for employment or for promotions on impermissible grounds of race, sex, ethnicity, age, or disability, at least according to early critics of those Acts. We no longer have the right to contract for employment with whomever we wish and on whatever terms we desire because of the impact of these laws. Likewise, our freedom to sell or rent our home to whomever we wish is compromised by the civil rights of others to not suffer discrimination in housing or rental markets. ³ Again, we do not have the right to contract for the sale, purchase, or rental of our property with whomever we wish, and on whatever terms we desire, and we do not have such a right, in part, by virtue of various civil rights laws.

¹ See, e.g., Robert Dugan, Civil Rights and Freedom of Contract: Employment, Housing and Credit Transactions (Part I - Employment), 26 S.D. L. Rev. 259, 259-60 (1981) (exploring tensions between civil rights to nondiscrimination and rights of contract); see also, e.g., Davison M. Douglas, Contract Rights and Civil Rights, 100 Mich. L. Rev. 1541, 1541-42 (2001) (reviewing David Bernstein, Only One Place of Redress: African-Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal (2001), which argued that African-Americans were helped by the Lochner Court's laissez faire philosophy, more than by the regulatory apparatus of state regulation).

² See generally Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at scattered sections of Titles 2, 28, and 42 of United States Code) (stating that one of the purposes of the Act is to establish a Commission on Equal Employment Opportunity).

³ See generally Fair Housing Act of 1968, Pub. L. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§3601-3619 (2012) (prohibiting the refusal to sell, rent, or negotiate the sale or rental of a property for discriminatory reasons).

Similarly, our right to contract for the sale of our labor, for whatever wages for which we can bargain, and on [*552] whatever terms we manage to strike is seemingly compromised by what are widely viewed as “civil rights” to a minimum wage and fair working conditions, which are enforced by various legal regimes coming out of the New Deal. More recently, various entitlements flowing from the Family and Medical Leave Act ⁴ also substantially alter terms of employment contracts, regardless of the will of the contracting parties. That Act as well is widely understood as protecting the civil rights of nondiscrimination against parents or caregivers in the workplace.

Presumably, all of these civil rights either prevent some labor contracts from being consummated at all or dictate the terms of those that do come to fruition. To take one further example, our felt right to contract only when we voluntarily consent to do so, and to refuse to contract whenever we so desire, is compromised by our newly crafted obligation under the Affordable Care Act ⁵ to purchase health insurance, an obligation clearly aimed at insuring to all Americans a secure civil right to health care. So again, the natural right to contract, or to not contract seems to be badly compromised by the civil right to health care, as neatly captured and then popularized by the *reductio* argument employed by advocates and Supreme Court Justices alike that mandating the purchase of health insurance, as the Affordable Care Act tries to do, is tantamount to ordering all of us to go to the store and purchase a head of broccoli. ⁶ If the “individual mandate” is required by a broad civil right to health care, then that civil right too is in tension with our right to contract.

More generally, or more abstractly, our natural right to contract is seemingly in conflict not only with our civil rights laws, but also with at least some very general obligations of civil society, such as, for example, the duty to help others if such help can be given without undue hardship, or our various duties - whether legal or moral - to assist family members, neighbors, or co-citizens, solely by virtue of close relational affinity. At the root of both this more general tension, and that between contract and the rights flowing from our various civil rights acts, I believe in a modern sense, that our obligations today should flow

solely from voluntary acts of consent and not from either duties of benevolence, or from our membership in civil society any more than it should follow from our membership in a clan, tribe, family, or neighborhood. When we moved so famously from [*553] status to contract as the font of legal obligation, we have come to believe, perhaps, that we shed not only obviously noxious sources of non-voluntary obligation such as enslavement or marital status, but more benign ones as well, such as membership in a civil society that is committed to such social projects like the racial and sexual integration of our workplaces and schools, or the health, safety, education, and well being of all citizens. Our obligations today, we tend to think, should stem from what we have agreed to do, and not from what or who we are, including not only our race, or gender, or class but also, apparently, our civil identity. From within the logic of our commitment to contractual freedom, civil society and its projects, including the project of achieving some measure of racial or sexual justice, is not the source of obligation any more than race, class, or gender itself should be. Rather, contract is the source of obligation, and to the extent civil society and the civil rights obligations that partly constitute it impose obligations outside of contract, it is felt to be in tension with those freedoms and rights.

In these comments I want to resist this tension; thus, I will ultimately argue that the felt tension between a right to contract and civil rights, as well as between the idea of contract and the obligations of civil society, although plenty real enough, rests on an unduly narrow conception of both the idea of contract and the idea of civil rights. The widely shared understanding of a right to contract as delineating a separate sphere of unadulterated individual sovereignty, within which the state may not intrude, comes to us, I will suggest, in part, from the now discredited constitutional jurisprudence of the *Lochner* era. ⁷ Although the constitutional law from that era is no longer good law as is widely conceded--today, we do not have a constitutional right to contract that gives us full sovereignty over whether, with whom, and on what terms to contract - nevertheless, our contemporary general understanding of both what the natural right to contract is, and what the constitutional right should mean, or could mean, or would mean, if only we had one, or, perhaps, what it will mean, if we ever get a Court

⁴ Family Medical Leave Act (FMLA) of 1993, Pub. L. No. 103-3, *107 Stat. 6 (1993)* (codified as amended at [29 U.S.C. §§2601-2654](#) (2012)).

⁵ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, *124 Stat. 119 (2010)* (codified at scattered sections of Titles 4, 18, 21, 25, 26, 28, 29, 30, 21, and 42 of the United States Code).

⁶ See [Nat'l Fed'n of Indep. Bus. v. Sebelius](#), 132 S. Ct. 2566, 2591 (2012).

⁷ See *infra* Part I.

that gives it back to us, is heavily determined by that constitutional jurisprudence. Thus, the understood contemporary meaning of the idea of a "right to contract," which is in such tension with the civil rights acts and other obligations of civil society, is largely an overhang from a discarded constitutional jurisprudence. The meaning that jurisprudence has given us of the right to contract, however, was never discarded; what we left behind was the faith that it is protected by the constitution.

[*554] The Lochnerian meaning of the "right to contract" is not, however, the only possible social meaning of that right available to us, and Lochnerian jurisprudence is not the only historical context in which the right to contract has played a role in our positive and fundamental law. A very different understanding of both the content and meaning of the right to contract, I will argue, comes from the civil rights traditions themselves. "Civil rights" are widely understood today, as meaning roughly rights of nondiscrimination: our civil rights are our rights not to be discriminated against on the basis of impermissible characteristics. This is the understanding of "civil rights" that is in tension with our understanding of the natural and Lochnerian era's constitutional right to contract. But this understanding of "civil rights" as "antidiscrimination rights" is clearly inadequate for two reasons. First, over the century, we have used the phrase "civil rights" to include a number of rights, such as free speech rights, rights to the protection of the state against private violence, labor rights, and union rights, and, these days, rights to health care or rights to affordable health insurance. However, these rights have little or nothing to do with discrimination. So civil rights are clearly not only antidiscrimination rights. Second, and more to my point here, even those civil rights that target and then prohibit discrimination do not do so exclusively. Rather, and as the Civil Rights Acts of both the nineteenth and twentieth centuries make clear, the civil rights of which we cannot be discriminatorily deprived by virtue of those laws notably include the right to: contract, own and sell property, make a will, testify in court, sue for injuries wrongfully inflicted upon us, and the right to be protected by the state against private or public acts of violence. These are civil rights too. Thus, our civil rights include not only rights to be free of discrimination, but also a number of common law rights,

including rights derived from the common law legal regimes of contract and property law, of which we cannot be discriminatorily deprived. The "right to contract," whatever its status as a constitutional right, is clearly a civil right and has been since it was declared as such in the Civil Rights Act of the mid-nineteenth century.⁸

What is the nature of the right to contract, understood not as a Lochnerian right of individual sovereignty, but instead as one of a number of civil rights, and of which, according to our civil rights laws, we cannot be deprived? Below I will argue that the civil right to contract is quite different from the constitutional right, or the natural right to contract because it was defended by the Supreme Court during the Lochner era and continues to have such an impact on our political imaginations. The civil, [*555] rather than constitutional, right to contract has a different historical pedigree. It rests on a different jurisprudential conception of the point of contract, and it stands in a very different relation to the civil society from which it originates. Finally, when understood as itself a civil right, the "right to contract" is clearly not in conflict with our civil rights laws in toto, or with more general obligations of civil society. Rather, the civil right to contract is fully consonant with our statutory civil rights, both to nondiscrimination and more broadly. In fact, far from limiting the civil right to contract, our civil rights in toto, both the nineteenth century ones and our more modern ones, quite dramatically extend and deepen it.

In the first section below, I delineate what I believe to be the still-dominant and quasi-constitutional conception of the right to contract, as it has been understood at least from the Lochner era to today.⁹ In the second section, I contrast the Lochnerian constitutional right to contract with the civil right to contract.¹⁰ In the third section, I show that the civil right to contract, unlike the constitutional one, is fully consistent with our modern civil rights laws and broadly understood.¹¹ In the third section, I also explore the relationship between the civil right to contract and civil society, where I will suggest that rather than being in tension with it, the civil right to contract is one of the core, and perhaps the core architectural foundations of civil society.¹² The conclusion briefly recapitulates the argument.

I. THE NATURAL RIGHT TO CONTRACT AND ITS CONSTITUTIONAL ORIGINS

⁸ See Civil Rights Act of 1866, Pub. L. No. 39-26, [14 Stat. 27 \(1866\)](#).

⁹ See *infra* part I.

¹⁰ See *infra* part II.

¹¹ See *infra* part III.

¹² See *infra* part III.

I am going to call the familiar understanding of the right to contract where civil rights laws in particular and civil society in general are in such apparent tension, a "self-sovereignty" conception of that right. According to this view, the "right to contract" is a natural, or pre-legal right that confers sovereign authority on the individual within some limited and delineated sphere, to decide whether, with whom, and under what terms to enter contracts that then become the source of his other-regarding obligations. The right to contract, so understood, dictates a "sphere of sovereignty" within which the individual is, so to speak, in full command of his obligations. Within that sphere, the individual is unencumbered by other, and particularly more civic obligations. The boundaries of his contractual obligations thus determine not only what he must do - basically [*556] he must do as he promised - but also what he need not do outside of his duties to refrain from harming others. His legally binding obligations to affirmatively assist others are determined by no source of authority other than his own will. This is simply what it means to have a "right to contract."

If that is right, then the obligations imposed on all of us by our various "civil rights" laws are indeed at right angles with the right to contract in at least three distinct ways. First, if individual sovereignty is the point of the right to contract, an individual cannot be required to contract with any particular person or firm, or to bind himself to any particular terms. He must be free not to contract, whether for good reasons, bad reasons, or no reasons at all. A requirement to contract with particular partners or on particular terms is even logically oxymoronic, as well as politically noxious. This is the source of the tension between our felt contract rights and both antidiscrimination rights in employment and housing, and New Deal styled labor rights, such as rights to a minimum wage and decent working conditions. Second, if the point of the right to contract is individual sovereignty, an individual cannot be required to enter into a contract, no matter who it is with and no matter what the terms, whether for his own good or in furtherance of a larger societal or communitarian goal. A "mandatory contract," then, is simply an oxymoron. At common law, for example, as expressed in a number of iconic cases, an individual - even a professional - cannot be obligated to come to the aid of another person, even with an expectation on both sides of eventual payment: no one can be required to enter a contract to come to the assistance of another person.¹³ Exceptions to this rule are few and far between. The Contract is the source of obligation,

once entered into, but the assumption of the obligation must be entirely voluntary. This is the source of the tension between contract rights and the insurance mandate in the Affordable Care Act, or the tension between the idea of contract rights and the hypothetical state directive to buy broccoli.

Third, and somewhat more ambitiously, on the self-sovereignty conception of the right to contract, an individual cannot be imposed upon to provide aid or assistance to others outside the realm of his or her contractual, consensual undertakings, beyond those obligations not to harm that are imposed by criminal law or a narrowly drawn law of tort. This is what it means to move from "status to contract," and this is the source of the tension between contract rights and the obligations of civil society, including both the various statutorily imposed obligations to assist others, [*557] and any legally enforced duties of generalized benevolence. This larger conflict is perfectly captured in a pivotal scene in *The Great Gatsby* when the wealthy, "old moneyed," Tom Buchanan explains to his car mechanic George Wilson that he, Buchanan, does not have to sell his car to him, and if he chooses not to, Buchanan explains, he owes Wilson "no obligations ... at all."¹⁴ If there is no contractual obligation, there is no obligation at all, as Buchanan says, and whether or not there is a contractual obligation is within the domain of self-sovereignty. As Buchanan explains to Wilson, in the absence of contract, Buchanan owes Wilson nothing. All that he might owe him, conversely, is what he has promised, or perhaps, what he would have promised, had transaction costs been low enough to facilitate the contract - our post status-to-contract understanding of the meaning of tort obligations. Contract, either real or hypothetical, exhausts the realm of obligation.

Where did this "self-sovereignty" conception of contract - as conferring absolute rights on the individual to determine whether, with whom, and on what terms to contract, and then limiting our obligations to those promises - come from? Obviously, the "right to contract" so understood, and that seemingly conflicts with both our civil rights laws and with the obligations of civil society, is not a purely legal construct. It did not come, for example, from the common law of contract. The common law courts have, after all, found occasion to fashion quasi-contracts that impose mandatory contracts on parties who have not consented to them, constructed terms requiring good faith, lack of duress,

¹³ See, e.g., *Hurley v. Eddingfield*, 59 N.E. 1058 (Ind. 1901).

¹⁴ F. Scott Fitzgerald, *The Great Gatsby* 114 (Scribner trade paperback edition 2004) (1925).

and substantive conscionability in all contracts regardless of the parties' consent, and have even deigned to dictate who may and who may not enter contracts: those over the age of majority, but not those under the age of majority, and those who are deemed competent, but not those who are deemed incompetent, and so on. The individual sovereignty conception of contract cannot be pinned on the common law.

So, again, where did it come from? One possibility, is that the popular American conception of a natural "right to contract" that preserves a sphere of self-sovereignty is rooted in our relatively short-lived history of a constitutional "right to contract," once recognized by the Supreme Court as protected by the Due Process clause of the Fourteenth Amendment,¹⁵ and which reached its high point in the early 1900's, in such cases as *Lochner* [*558] v. *New York* and *Pierce v. Society of Sisters*.¹⁶ In those cases, and in that era, the individual right to contract protected by the Due Process Clause of the Constitution, did indeed protect an individual's pre-existing natural liberty, or right, to decide whether, with whom, and on what terms to contract, and thereby assume other-regarding obligations.¹⁷ That constitutional right to contract no longer has much, if any, constitutional significance - it was effectively gutted by the constructive reversal of *Lochner* in *West Coast Hotel v. Parrish*,¹⁸ and then in the Court's repudiation of its *laissez faire* and radically individualistic assumptions in subsequent decades. Thus, it is now universally understood that it is not only within the police power of the states to modify contract terms to dictate to some degree with whom one may and may not contract, and to require some contracts (such as automobile insurance contracts) as conditions of privileges (such as driving), and to ban entirely other contracts - such as contracts for prostitution, or gambling or surrogacy pregnancies - as contrary to public policy. However, it is also within the commerce clause power of the national government to regulate contracts as well, so long as those

contracts in some way affect interstate commerce.¹⁹ Civil rights obligations fit squarely within the contours of this reformed, post-*Lochnerian* constitutional jurisprudence: we are precluded, by virtue of those laws, from contracting for housing or labor with whomever we please and on whatever terms we can wrest. Thus, now we do not have, if we ever had, an absolute constitutional right to the contractual sovereignty described above. We have no constitutional right to refuse to enter contracts that have been mandated by a state, or to hire only white people or only men, or to include in those contracts onerous contract terms that violate state's norms of unconscionability, public policy, or good faith, and so on.

Our contemporary understanding of the content and meaning of the "right to contract," however, is still strikingly *Lochnerian* in its content - we just do not think the Constitution protects it any longer, at least in as robust a fashion as it once did. We still tend to mean by that phrase, a natural right to determine whether, with whom, and on what terms we will take on other-regarding obligations, that in turn determines a sphere of freedom into which the state may not intrude. More briefly, we still, more or less, mean by that phrase that the individual's will and only the [*559] individual's will is the source of our other-regarding obligations. That social meaning of the "right to contract" is as dominant today, both in popular consciousness and in academic discourse, as it was then dominant, in the aughts, teens, and twenties in constitutional law.

The individual sovereignty conception of the right is, for example, reflected in a resurgence of Ayn Randian styled militant anarchism in popular culture, from the new found cult stature of those novels themselves, to its many more benign cultural reinterpretations, from *The Incredibles*,²⁰ to *24*,²¹ to *The Hunger Games*.²² In all of these, as in *Atlas Shrugged*,²³ personal bonds and only personal bonds, individually willed, rather than civic obligations of any sort, constitute the floor - the very thin floor - of social

¹⁵ See [Northwestern Nat'l Life Ins. Co. v. Riggs](#), 203 U.S. 243, 252-53 (1906); [Allgeyer v. Louisiana](#), 165 U.S. 578, 589 (1897).

¹⁶ See [Pierce v. Soc'y of Sisters](#), 268 U.S. 510 (1925); [Lochner v. New York](#), 198 U.S. 45 (1905).

¹⁷ See [Pierce](#), 268 U.S. at 534; [Lochner](#), 198 U.S. at 53.

¹⁸ See [W. Coast Hotel Co. v. Parrish](#), 300 U.S. 379, 391 (1937).

¹⁹ [Virginian Ry. Co. v. Sys. Fed'n.](#), 300 U.S. 515, 558 (1937).

²⁰ *The Incredibles* (Walt Disney Pictures & Pixar Animation Studios 2004).

²¹ *24* (Imagine Entertainment & Twentieth Century Fox Television 2001-2010; 2014).

²² Suzanne Collins, *The Hunger Games* (2008).

²³ Ayn Rand, *Atlas Shrugged* (1957).

obligation. It is echoed in the rise to power of the Tea Party within the Republican Party, with its glorification of contractual freedom, its radical repudiation of civic society, and the movement's leader Rand Paul's explicit repudiation of the moral authority of the Civil Rights Acts themselves, with the cited ground being those Acts' limitation on individual contractual freedom.²⁴

It is vividly and ominously reflected in Justice Roberts' extended discussion, albeit in dicta, of the failure of the Affordable Care Act's individual mandate to pass constitutional scrutiny under the commerce clause: the mandate, Roberts opined in that decision, does not sufficiently affect commerce so as to be within Congress's regulatory powers because it requires individuals to do something - contract - rather than simply forbidding them from contracting in a particular way.²⁵ That, he argued, citing virtually no positive or legal authority, simply goes too far; that, we might surmise precisely by virtue of the absence of such reliance, violates a natural right of individuals to decide whether to contract.²⁶ It violates their sphere of individual self-sovereignty, and that violation in turn determines the limit into which the commerce clause based authority of the federal government may not reach.

In academic discourse, the dominance of this sovereignty understanding of the right to contract is vividly reflected in the multiple [*560] reinvigoration and positive reassessments of *Lochner*-era jurisprudence that have so fruitfully challenged the conventional post-*Lochner* consensus within the academy over the last decade. Finally, it is most cleanly reflected in the contours of the most developed jurisprudential conceptions of contract and of the moral point of contract: that contract rightly valorizes both the individual act of consent and individually dictated consensual transactions, such that, for deontic, Kantian, or just loosely libertarian reasons all consensual transactions are regarded as of value solely because of their consensuality. Alternatively, contract rights and contract law rightly maximize societal wealth by encouraging individual acts that promote economic efficiency. Both these libertarian, or Kantian understandings and the related economic or efficiency based understandings reflect as well as rest on the self-sovereignty conception of the right described above: individual consent and wealth maximization both are

furthered by the self-sovereignty at the heart of the right of contract, and both are compromised by limits on that sovereignty. It is that social meaning of the right to contract that is in felt tension with the obligations attendant upon us by virtue of the civil rights acts, and the duties imposed upon us by civil society.

II. THE CIVIL RIGHT TO CONTRACT

Is this neo-*Lochner*ian understanding of the right to contract the only understanding available to us? I think not. A very different understanding of the right to contract can be derived not from our constitutional history, but from the history of the civil rights themselves. The right to contract, well before the *Lochner* era Court enshrined it as a constitutional right, was understood not as a limit on civil rights, but as itself a civil right. It was understood to be one of a number of such rights guaranteed to us under various civil rights laws passed by Congress during the reconstruction on the heels of passage of the Thirteenth and Fourteenth Amendments. The "right to contract," understood as a civil right, like rights to property and other civil rights, such as the right to physical protection from the state against violence, or the right to sue in court for injuries we sustain cannot be denied because of race. Thus, to quote the Civil Rights Act of 1866:

And such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person [(execution, imprisonment)] and [*561] property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.²⁷

The right to contract, according to the framers of the Civil Rights Act, along with the right to own and sell property, write a will, sue for injuries, give testimony, and so on are all rights that cannot be denied on the basis of race. Freed

²⁴ Rand Paul Tripped Up by Civil Rights Act Once Again, MSNBC (Oct. 2, 2013, 2:19 P.M.), <http://www.msnbc.com/rachel-maddow-show/rand-paul-tripped-civil-rights-act>, [<http://perma.cc/P462-BTNC>].

²⁵ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012).

²⁶ See *id.*

²⁷ Civil Rights Act, [14 Stat. 27 \(1866\)](#).

slaves were granted the same rights to enter a contract, own, buy, and sell property, and sue for injuries as whites or at least as white men. The "right to contract" in this context, is one of the "civil rights" of which we cannot be deprived on account of impermissible characteristics. Indeed it was one of the original cluster of such rights of which we cannot be deprived, for impermissible reasons. The right to contract, then, is itself a "civil right."

How might our understanding of the right to contract change if we were to think of that right as a central civil right, rather than as a natural right, fitfully protected by constitutional guarantees? It depends, of course, in large part on what we mean by a "civil right." I have written about this at length elsewhere,²⁸ and will only summarize those arguments here. As noted above, these days we tend to think of civil rights as rights of anti-discrimination, but this is clearly inadequate for reasons mentioned above that bear repeating: first, a number of what are commonly called civil rights, such as labor rights, free speech rights, or rights of criminal defendants, are not rights of antidiscrimination at all. But second, even our civil rights of antidiscrimination protect us against the underlying right of which we cannot be discriminatorily deprived. Thus, we may have rights to marry, of which we cannot be deprived on the basis of sexual orientation, and we do have rights to be considered fairly for a job, of which we cannot be deprived on the basis of race and gender, and, of course, rights to contract, property, and to access to the courts, of which we likewise cannot be deprived by virtue of discrimination. Our antidiscrimination rights are always complex civil rights; they are, in effect, "rights to rights" with the first right in that phrase being the antidiscrimination right, and the second being the civil right, of which we cannot be deprived. The right to contract is one such civil right. It is a right of which we cannot be deprived on the basis of race, sex, or any other impermissible characteristic. The right to contract itself, though, is a civil right, and has been recognized as such since at least 1866.

[*562] What is a civil right? Civil rights, in turn, have been defined, at least since Thomas Paine's iconic account in his pamphlet *Rights of Man*, as natural rights, but a particular kind of natural rights. Civil rights are those natural rights which we have not only by virtue of being human - this is true of all natural rights - but also by virtue of our

membership in civil society, and which we cannot enforce "on our own."²⁹ Paine defined them in this way:

Natural rights are those [rights] which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation, some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection.³⁰

Thus, the definition of a civil right is threefold: a civil right is first, a natural right, meaning a right we have by virtue of being human. Second, it is a natural right, which we enjoy by virtue of being a member of society. Third, and unlike, say, rights of conscience, it is a natural right, which we cannot enforce on our own. Put positively, a civil right is a right to participate in civil society, which requires the presence and operation of positive law for its realization. In other words, it requires the presence rather than absence of law and legal institutions. Civil rights are, in this limited sense, quintessential positive rights; they are rights to the operation of law and the state in such a way as to realize the individual's enjoyment of the underlying good or status or sphere of life the right aims to ensure.

If civil rights are, as Paine argued, natural rights that we have by virtue not only by being human, but by virtue of our membership in society and rights that we cannot enforce on our own and a right to contract, as per the drafters of the country's original civil rights law, is itself a civil right, which must be extended to all including freed slaves, then what is the right to contract when understood as a civil right? Obviously the most direct effect of the inclusion of the right to contract in the 1866 Act is that the contracts of freed slaves must be enforced in the same way and to the same degree as the contracts of white men. But what is the meaning of the "right to contract" that must be accordingly enforced? What is the point, to [*563] borrow from one of Ronald Dworkin's most evocative metaphors,³¹ of the civil right to contract that must be so extended? How might it differ from the conception of a right to contract as a natural right as described above?

²⁸ See, e.g., Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, [53 Wm. & Mary L. Rev. 713 \(2011\)](#).

²⁹ See Thomas Paine, *Rights of Man* 68 (Penguin Classics 1984) (1791).

³⁰ *Id.*

³¹ See Ronald Dworkin, *Law's Empire* 228-38 (1986).

First, the civil right to contract, like all civil rights, is a natural right, by which Paine meant, a right that attaches by virtue of one's humanity, and which we might today interpret. In more modern terms, borrowing from Nussbaum and Sen's naturalist account of human rights, the right is in service of natural human capabilities conducive to a good and flourishing life.³² Human rights are those rights which protect or further our capabilities which in turn enable us to flourish. The kind of human interaction manifested in contract is both a capability of human beings and one that contributes to our flourishing. But second, if Paine is right about the meaning of civil rights, and if the framers of the 1866 Act were right that the right to contract is a civil right, the right to contract is a distinctive kind of natural right. The right to contract is a right we have by virtue not only of our humanity alone, but also by virtue of our membership in civil society. Contract, and the capacity to engage in it, is, in other words, a creation of civil society. It is not an implication of our human form alone. Like our other civil rights, the right to contract, then, is a right of participation. It is a right to participate in that civil society. It is at heart a right to be included in that which society facilitates.

More specifically, with respect to the right to contract, it is a right to participate in the society constructed, more or less, by contracts. So, we have a natural right to exchange goods for other goods or services because such behavior furthers our individual capabilities for living fruitfully, but that is a natural right that can only be realized through consumer markets that are structured by law and institutions: not only laws enforcing contracts, but laws and institutions specifying rights and parameters of ownership, fair dealing, and criminal law. The civil right to contract then guarantees us access to those laws and institutions that structure our markets for consumer goods, protecting our participation in those markets. But the market for consumer goods is not the only area of civil life that contract facilitates, and participation in those markets is not the only right that the right of contract confers. For example, civil right to contract also protects a right to participate in markets for labor, markets for property, and markets for the pooling of risks through insurance contracts. Those markets in turn serve human needs and capabilities that are also, themselves, both civil and "natural" in origin. We have a natural capability [*564] to enjoy meaningful work, but we need civil society in order to protect that capability. We need access to the laws and institutions that structure a workplace that rewards merit and provides meaningful floors of compensation and safe working conditions. We access those laws and institutions, in this society, through contracts for our labor.

A right to contract then, understood as a civil right, protects our ability to access those laws and institutions that structure the fair and meaningful labor we have a natural right to enjoy. Likewise, we have a natural capability to live a long and healthy life, but we need civil society to protect that capability. We will not live long and healthily in a state of nature, rather we need laws and institutions that can generate medical knowledge and expertise, and its distribution through networks of provisions of care. We access those laws and institutions, in turn, in this society, through contracts. We enter into contracts with doctors and hospitals, but more fundamentally, contracts with insurers who in turn pool risk. We have a civil right to access those networks, and thus a civil right to participate in the pooling of risk facilitated by insurance policies, itself accomplished through contract. Thus, we have a civil right to contract for health insurance. Likewise, we have a natural capability to enjoy property, and the security and pleasures it bestows, but we need civil society to protect that capability. We need both the laws and institutions of private property and criminal law to generate the protections and securities of individually owned property. We have a civil right then to access those laws and institutions, and the way we do so, in this society, is through contract. Our civil right to contract, then, guarantees us, in part, rights of access to those laws and institutions that structure and protect property and its enjoyment.

Second, and again according to Paine, the civil right to contract, like all civil rights, is one that cannot be effectuated by "man standing alone." It is in its essence a right, the enjoyment of which is entirely dependent upon social forms. It is a profoundly social construct. It requires societal construction, constraint, and enforcement. It is not something that exists in the state of nature. It is a product of, as well as a mainstay of, civil society. The point of the right, then, cannot be to protect a natural, pre-civil sphere of individual sovereignty that exists independent of the state or of state law. No such sphere exists; we would not be contracting in such a state. The civil right, again, is one we enjoy not only by virtue of our membership in civil society, but also it is one we cannot perfect on our own. The point of the right, then, is to protect our participation in this thoroughly civil sphere of bargain and exchange.

Let me put all of this together. The civil right to contract, unlike the constitutional one, is not, at heart, a right to self-sovereignty. Rather it is a [*565] right to participate in markets of various sorts that are themselves conducive to human flourishing. It is a right to enjoy access to the

³² See Martha C. Nussbaum & Amartya Sen, *The Quality of Life* (1993).

benefits and goods facilitated by those aspects of civil society that are structured by contract. There are clearly several such aspects. First, and most directly, the acts of barter, exchange, and bargain - the sale and purchase, for example, of consumer goods - is a human activity that is itself social and civil, and the right to contract is a right to participate in that social and civil form of activity. The civil right to contract then is a right to participate in various markets of exchange.

Contract is also an activity that facilitates other forms of social and civil life than that represented by simple bargains, and the civil right to contract therefore is a right to participate in those more complex forms of social and civil life as well. Contract facilitates, for example, cooperative enterprise that can lead to not only more complex, but also more rewarding forms of living. The enjoyment of private ownership of real property is one such form of life. It is facilitated by property and property law, to which the civil right of contract grants access. Similarly, contract facilitates participation in the legal and institutional structures of employment. Those structures in turn contribute to both our individual security against want, and our societal enjoyment of the products of our cooperative labor. The civil right to contract is a right to participate in that world of employment. Contract facilitates the pooling of life's risks, both catastrophic and mundane, such that when those risks come to pass they can be weathered more smoothly. In turn, that pooling of risk in turn leads to better health care, and hence better health outcomes, meaning longer and healthier lives. It facilitates cooperative action in all of these spheres - markets, property, employment, health - that might otherwise be precluded by familiar prisoners dilemmas, thus increasing well-being all around. In all of these spheres, contract facilitates a sharing of excess value that otherwise tends toward either a winner-take-all or worse-outcomes-for-all set of outcomes, increasing both inequality and subordination. Rights to contract serve social and civil values, and not just individualist ones.

III. CONTRACT RIGHTS AND CIVIL RIGHTS

The rights protected by the Civil Rights Acts, both those of the nineteenth and twentieth centuries, are not in tension with the right to contract if we understand the latter as a civil, rather than natural or constitutional right, and if we understand civil rights as including not only nondiscrimination rights themselves, but as also including the rights of which we cannot be discriminatorily deprived. Again, the conflict between civil rights and contract rights

stems from viewing civil rights as simply [*566] anti-discrimination rights, and contract rights as quasi-constitutional or natural rights of individual self sovereignty, delineating a sphere within which the individual has sole authority to determine whether, with whom, and on what terms to assume other-regarding obligations. However, this rests on a misguided understanding of both the ideas of "contract rights" and of "civil rights." Civil rights are not simply rights against discrimination, they are, rather, rights of participation; they are rights to participate in the spheres of social or civil life that are themselves facilitated by laws and institutions. The right to contract is not just a natural and constitutional right to self-sovereignty, it is also one such civil right. As such, it confers a right to participate in markets for, among much else, consumer goods, employment, insurance, and real property. Civil rights, in brief, are rights of access to civil society. Contract rights are rights to participate in those aspects of civil society facilitated by private contract. Contract rights, far from being in tension with civil rights, are themselves civil rights, and as such, they protect access not only to consumer markets but also to other civil rights, such as rights to property, employment, and health care as well. So, civil rights are contract rights, and contract rights are themselves civil rights.

The civil right to nondiscrimination in employment protected by Title VII ³³ does not fundamentally limit contractual freedom, when the latter is understood as a civil rather than constitutional right, but rather, clearly expands it. Rights to nondiscrimination in employment are rights to participate in a sphere of contractual life that facilitates the provision and compensation of labor in ways that, in turn, further the individual's interest in security and the societal interest in enjoyment of the products of cooperative labor. Title VII rights against discrimination in employment are themselves simply a special kind of civil contract rights. They are rights to contract in a literal sense; they extend the right to contract for one's labor to ones previously excluded. They are also contract rights more broadly understood: they guarantee participation in a sphere of life - employment - that is itself structured through contracts and that collectively promotes individual well-being and individual capabilities - capabilities for meaningful and dignified work. Civil rights guaranteed by Fair Housing Acts are likewise not in tension with contract rights. Rather, those civil rights are contract rights; they are rights to participate in markets for the enjoyment, sale, and purchase of property that are themselves facilitated by contract. The right of nondiscrimination in employment and housing no more limits the right of

³³ Civil Rights Act of 1964.

contract than does extension of the right [*567] to vote limit by diluting the power of the voting rights of those who already possess them. Participation in markets for employment and property is central to civil society. To echo Paine, they are rights we have by virtue not only of our humanity, but also by virtue of our membership in that society. Guaranteeing that participation broadens and deepens the right to contract, it does not limit it.

The rights to affordable health insurance guaranteed by the Affordable Care Act likewise are not limits on the civil right to contract; rather, they are themselves civil contract rights. The right to insurance is not, after all, a right to health *per se* but a right to a particular kind of contract; it guarantees the right to participate in the pooling of risk of ill health that makes the forbearance of medical illness less financially catastrophic. The Affordable Care Act guarantees that everyone, not just people with secure employment or with considerable private resources, has access to that particular form of contract, and the relative security against risk to which it gives rise. Like Title VII or the Fair Housing Act, it thus expands, rather than shrinks, the civil rights to contract. To provide one final example, the Family and Medical Leave Act, which requires employers to provide unpaid leave for their employees with newborns or other family members requiring care, clearly alters the terms of employment contracts in ways that might not have been willed by both parties in the absence of the law.³⁴ Nevertheless, it just as clearly expands access to the civil right to contract. It makes it possible for new parents of infants or grown children of elderly parents to continue their employment uninterrupted, thus maintaining their presence in the contractual world of work. Contracts open the doors to the world of employment. The Family and Medical Leave Act ensures that those doors remain open, even after the birth of a child or the sickness of a parent, events which in the absence of the law, can cause a breach in the contractual and interactive world of employment because of the urgency or priority of the private and intimate world of caregiving. Like anti-discrimination laws, and like The Affordable Care Act, The Family and Medical Leave Act expands participation in the world of contract, and the complexity, security, risk-pooling, interactivity, and enrichment that contract facilitates.

Thus, the civil rights protected by the Civil Rights Acts, as well as those protected by The Affordable Care and the Family and Medical Leave Acts, are not in conflict with the "right to contract," if by the latter, we mean the civil right to contract. The civil right to contract is a right to participate in

the spheres of life largely structured by contract and contract [*568] law; the sale and purchase of consumer goods, real property, insurance, employment, and higher education. The civil rights acts of both centuries, the Affordable Care Act, and the Family and Medical Leave Act all broaden and deepen participation in those contractual spheres of life. They thereby broaden and deepen participation in contract. The civil right to contract, understood as a right to participate in the civil forms of life made possible by contractual behavior, is strengthened, not undermined, by the civil rights laws of both the nineteenth and the mid-twentieth centuries.

And what of the last conflict noted above: the conflict between a right to contract, on the one hand, and the duties and obligations of civil society, including, possibly, affirmative obligations to help others if we can do so at no or little cost? Was Buchanan right in *The Great Gatsby* to callously inform Wilson that he, Buchanan, did not, after all, have to sell his car to him, and that if he did not, he would owe him no obligation at all? Does contract so exhaust the realm of other-regarding obligations that we are never obligated to provide assistance outside of our contractual and voluntarily assumed duties, which we are never obligated to assume in the first place? Does the movement from status to contract obviate obligations stemming from our "status" as members of a civil society?

It may indeed, if we regard contract as described above: a natural or quasi-constitutional right to decide when, with whom, and on what terms to assume other-regarding obligations. But it may not, if we regard the right to contract as a civil right protecting rights of participation in contractual life, rather than as either a natural or constitutional right protecting a private and individual sphere of sovereignty. The civil right to contract is a right to enter those spheres of civil society largely regulated by contract. Although, the right itself is fully a product of that civil society, and the world to which it guarantees entrance and participation is likewise a product of civil society. The civil right to exercise contractual authority then can exist side by side with other civil rights and obligations including obligations to extend help to others if such obligations originate in civil society itself. Whether or not they do is another question. But if they do, the existence of robust contract rights does not stand in tension with them.

IV. CONCLUSION

In this essay I have tried to work out the implications of a straightforward syllogism. The right to contract, according

³⁴ See [29 U.S.C. § 2612](#) (a)(1).

to the drafters of the 1866 Act, is a civil right of which we cannot be deprived by discriminatory action. Furthermore, civil rights, according to Thomas Paine, at least since this country's beginnings, are those natural rights we [*569] have by virtue of our membership in civil society and which we cannot perfect on our own. The right to contract, then, as a civil right, is a natural right we have by virtue of membership in civil society and which we cannot perfect on our own. Like other civil rights, it is a right to belong, or a right to participate in the civil society, or those parts of civil society to which contract gives access.

What parts of civil society are those? Contract structures the public worlds of employment, health care, higher education, and commerce. We enter the workforce, schooling, commercial markets, and health care through contracts of employment, enrollment, sale and purchase, or insurance. Those worlds, to which contract gives entree, make our lives better in familiar ways. Employment gives us security against want as well as meaning in our productive lives - schooling enriches, complexifies our lives, and improves

our chances for success. Commerce and commercialism give a source of pleasure as well as access to markets that enrich us, and insurance allows us to guard against calamities by pooling risks with others. A civil right to contract then confers rights to participate in those worlds. A civil right to contract free of discrimination simply extends those rights of entry, participation, and belonging to those who had previously been excluded either because of enslavement, discrimination, racism, or sexism. None of these contractual realms would be possible, or even conceivable with the laws and institutions of civil society. The civil right to contract ensures for everyone, not just those who are privileged, or those with whom others wish to deal, or those to whom Buchanan deigns to sell his car, access to those institutions, and to the benefits of the laws that constitute them that allow all of us to flourish.

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